

Fighting COVID-19 with Religious Discrimination

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The Korean authorities have garnered [significant praise](#) for their effective response to COVID-19. However, the country's experience has not been without controversy. A significant proportion of cases were publicly attributed to a controversial religious congregation, and the authorities' dealings with its members raise questions about compliance with a number of human rights.

The Republic of Korea had the rare distinction of being prepared for the virus. Korea learned lessons from the [2015 MERS outbreak](#), when its infection toll was the [highest of any country outside the Middle East](#). The government implemented legislative reforms, notably [obviating the necessity to declare a state of emergency](#). The framework employed has helped Korea to manage the outbreak effectively, despite initially having the [largest number of confirmed cases after China](#).

The MERS outbreak and the IDCPA

Korea's response to MERS was initially characterised by secrecy. The Seoul government withheld infected individuals' locations from the public, though notably on the grounds that identifying medical institutions treating MERS patients might cause [unnecessary anxiety](#) to other patients, rather than out of concern for [individual privacy](#). This approach was [heavily criticised](#), as it failed to notify hospitals and municipalities as to risks they might face. MERS infected 186 people, ultimately killing 38. Several [important lessons](#) were learned from the outbreak, and a new legal regime for the management of such outbreaks was implemented. This regime, the [2015 Infectious Disease Control and Prevention Act](#) (IDCPA), was characterised by *transparency* and *flexibility*.

Many IDCPA provisions appeared prudent and rather innocuous post-MERS, covering issues such as funerals and vaccination record-keeping. However, certain sections were to prove controversial. For example, Article 76-2(2) empowered the Health Ministry to collect personal data, without a warrant, from both infected individuals, and those "suspected of infection" (with the latter term undefined). The article mandates that telecommunications companies must share the "*location ... of patients ... and [of] persons likely to be infected*" with health authorities. Article 76-2(1) enables the Ministry and the Director of the Korea Centers for Disease Control (KCDC) to require "*medical institutions, ... corporations, organizations, and individuals*" to provide "*information concerning patients ... and persons feared infected*". Public and private authorities are obliged to surrender, *inter alia*: personal information; medical records; immigration records; and any other information prescribed by Presidential Decree. In addition, Articles 6 and 34(2) invoke the public's "right to know", requiring the Health Ministry to "*promptly disclose*

information” to the public about the “movement paths, transportation means ... [and] contacts of patients of the infectious disease”.

These provisions raised the possibility of lists being drawn up based upon uncertain criteria, and individuals’ personal data being surrendered to governmental authorities. Further, the open-ended nature of “other information”, to be determined by Presidential Decrees, means that the provisions’ ambit is exceedingly broad. Finally, the creation of a public “right to know” and an obligation to share information concerning infected individuals, reflects an *ex ante* decision that personal privacy was less important than public health protection.

COVID-19 and the Shincheonji Church of Jesus

COVID-19 spread to Korea in early 2020. By mid-February, only 30 individuals had been confirmed as infected. Having dealt with MERS, the government [appeared confident](#) in its ability to contain the virus. The situation changed markedly on

February 16th, when a 61-year-old woman, “Patient 31”, attended a religious ceremony with 1,000 other worshippers in a building belonging to the Shincheonji Church of Jesus (SCJ) in Daegu. After several hours, she exited the church, having apparently left a trail of pathogens behind, later identified by Korean authorities as having triggered one of the largest COVID-19 outbreaks in the world.

The SCJ is a small Korean Christian sect with multiple outposts in China, including Wuhan. It was [initially assumed](#) that several SCJ members caught the virus there.

By March 8th, the KCDC [announced](#) that the outbreak associated with SCJ totalled 4,482 infections, or 62.8% of Korean cases.

The SCJ enjoys a disproportionately high profile for its size (320,000 members in a country of 52 million) and is [unpopular](#) with certain sections of the Korean public. The SCJ/COVID-19 connection provided an opportunity for the church’s critics. The SCJ was [repeatedly cited](#) in the media as having provided false lists of members and having asked its members to hide from authorities. Its members were [allegedly](#) instructed not to wear masks, and to attend church services despite the pandemic.

These allegations were exacerbated by official action. The KCDC [repeatedly issued press releases](#) explicitly linking the SCJ to the outbreak. The government vowed that all members of the church would be “found and tested”, with the language creating the impression that the church was [attempting to conceal its membership](#). This contributed to [public paranoia](#). In March, Seoul Mayor Park Won-soon [announced a lawsuit](#) against 12 SCJ leaders “for murder, injury, and violation of prevention and management of infectious diseases”.

Article 76 IDCPA was employed to extract surveillance footage, credit card histories and cellular geolocation data of both confirmed and potential patients without judicial approval. This enabled the government to rapidly “contact-trace” hundreds of thousands of citizens to curtail COVID-19’s spread. Articles 6 and 34(2), which invoke the public’s “right to know”, were also crucial. The authorities disclosed a large amount of information that, although generally pseudonymised, made certain

individuals readily identifiable online, including their links to the SCJ. Article 47 IDCPA was invoked to close SCJ facilities, while the church's headquarters was raided by police.

This combination of official action and media frenzy gave rise to [excesses](#) against SCJ members. [Alleged incidents](#) ranged from verbal abuse, to summary dismissal from jobs. There were also [reports](#) of public officials "outing" SCJ members upon request.

Political opportunism and the protection of public health

Korea held elections on April 15th. The result was a landslide victory for the ruling Democratic/Platform alliance, [a considerably better outcome](#) than had been anticipated prior to the pandemic. The COVID-19 crisis provided an opportunity for Korean leaders to demonstrate their competence. However, the IDCPA also created a convenient means for authorities to scapegoat a small religious community in order to deflect attention from their own failings. Notably, a [petition](#) calling for President Moon's impeachment had garnered the support of more than 1.4 million people by March 5th. This was supplanted by a [petition](#) calling for SCJ's dissolution, which attracted a similar number.

[The Korean constitution reflects the State's adherence to human rights norms.](#) Freedom of religion is protected by Article 20. Article 11 proscribes religious discrimination. Recent Constitutional Court decisions make it clear that [public authorities must respect this freedom](#). Korea has ratified several core human rights conventions, including the ICESCR and ICCPR. The response to the COVID-19 outbreak raised questions about the extent to which a national crisis may nuance this picture.

[Article 18.1 ICCPR](#) provides that one's religion may be practiced in private, while Article 18.2 prohibits coercion impairing one's freedom of religion. [OHCHR General Comment no.22](#) makes it clear that *"no one can be compelled to reveal his ... adherence to a religion or belief"*. By effectively revealing the details of SCJ members, the Korean government exposed many individuals who had sought to keep their faith private. Article 18.3 ICCPR permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law, and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The COVID-19 pandemic would seem to pass this test. However, General Comment no.22 makes it clear that

"in interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination"

and that

“limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated”.

The employment of the IDCPA does not seem to pass this test, resulting as it did in discriminatory measures against the SCJ and its members, notably in terms of compulsory [testing and interviewing](#) of all members, regardless of contact with infected persons, a measure not applied to other congregations. While clearly, a good number of SCJ members were exposed to COVID-19, the proportionality of many measures undertaken is deeply suspect. It would have been possible to restrict any nexus between the SCJ and COVID-19 to specific subsets of the church (the Daegu congregation). However, there was no discernible effort to do so. Rather, there seems to have been an active effort to implicate the SCJ *en masse*. Lee Jae-myung, the governor of Gyeonggi Province, who led the raid on SCJ headquarters, [pronounced](#) that “*this is a state of war*”, with SCJ clearly identified as the enemy. This raises questions as to whether the measures were in fact solely employed for the protection of public health.

Such concerns are not unique to Korea. The global crisis has demonstrated how [religious minorities can become easy targets](#), and how legislation enacted in the name of public health and/or crisis management may be employed to restrict religious freedoms.

Learning lessons and looking forward

To some extent, the Korean authorities employed the IDCPA effectively, curbing COVID-19’s spread. The IDCPA was conceived to deal with a potentially uncertain future situation, in which any false moves by government might entail grave consequences for the public. It was thus designed to provide the government with sufficient *authority* and *flexibility* to take measures to curb the spread of any virus. Each virus evolves differently, and from an epidemiological perspective, a test to determine whether a person is likely to have one virus may not be suitable for determining whether they have the next. Significant flexibility was required for definitions concerning uncertain and/or evolving categories, so that the legislation could be effectively employed when the moment arrives. However, clearly, the exercise of such flexibility must not contravene Korea’s international obligations, and restraining public authority in future may require IDCPA amendment.

Further IDCPA provisions are also problematic. Allowing for searches and seizure of personal data without judicial oversight represents a significant intrusion into the private lives of citizens. Article 17.2 ICCPR provides that “*everyone has the right to the protection of the law against such interference or attacks*”. In mitigation, it may be objected that in many countries, courts are either not in session, or sit in restricted constellations during the COVID-19 crisis. However, amending the IDCPA to provide for a special procedure through which warrants might be issued in such circumstances – perhaps via expedited review – could rectify the lack of oversight somewhat.

Finally, while prioritising public health over individual privacy and religious freedom may in some circumstances be justified, pseudonymisation should be implemented more carefully to keep the identities of those infected private wherever possible.

Korea's authorities have shown that they can learn lessons from outbreaks. MERS enabled the construction of an efficient system, albeit one that made too many compromises with regard to human rights. The electoral context, media frenzy and connection to the SCJ created a temptation for political leaders to backslide on certain human rights norms, and the IDCPA's flexible provisions provided an apparatus for them to do so. In recent days, a fresh spike of cases has occurred, with some linked to a gay nightclub. In light of the SCJ experience, it is perhaps no surprise that LGBT groups fear a [backlash](#).

Any means of dealing with a pandemic involves compromises. Not declaring an emergency has the advantage of couching the situation in terms of "normalcy", that is, regular legislation, and avoiding the suspension of democratic institutions, or rule by decree. However, the flexibility required by bespoke pandemic legislation can also lead to abuses. Legislative drafters must be conscious of this risk. It is to be hoped that lessons will be learned from the 2020 pandemic, and that a reformed IDCPA will result, which better reconciles Korea's admirable efficiency with its human rights obligations.

